Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN LAMBERT, Superintendent,
Washington State Penitentiary,

Petitioner,

v.

BRIAN KEITH LORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In a murder case, three teenagers claimed to have seen the victim between the time of her disappearance and the discovery of her body. Defense counsel made a conscious, informed decision not to call the teenagers as witnesses because of inconsistencies in their stories and to preserve counsel's credibility before the jury. The decision was made based on the written reports of two defense investigators and discussions between counsel and the second defense investigator. Defense counsel did not personally interview the teenagers. This case presents two questions related to a claim of ineffective assistance of counsel:

1. Whether counsel's decision not to have the teenagers testify was entitled to less deference, and constituted ineffective representation that undermined the adversarial process, solely because counsel did not personally interview the teenagers.

2. Whether the possibility the teenagers' testimony would have led to Respondent's acquittal meets the prejudice component of an ineffective assistance claim, which requires the defendant to show a reasonable probability that, but for the unprofessional errors, the proceedings would have been different.

PARTIES

The Petitioner is John Lambert, who succeeded Tana Wood as the Superintendent of the Washington State Penitentiary. The Respondent is Brian Keith Lord.

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PETITION

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 184 F.3d 1083 (9th Cir. 1999) (App. 1a-30a). The opinion of the District Court for the Western District of Washington is unpublished (App. 33a-121a). The opinion of the Washington Supreme Court is reported at 117 Wash. 2d 829, 822 P.2d 177 (1991) (App. 122a-324a).

JURISDICTION

The court of appeals entered judgment on July 14, 1999 (App. 1a), and denied a timely petition for rehearing on September 23, 1999. (App. 31a-32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

This case concerns Respondent's claim that trial counsel's informed, conscious decision not to call three witnesses was ineffective assistance because counsel did not personally interview the witnesses, but instead relied on interviews conducted by two defense investigators. The case raises issues concerning the measure of deference a court must apply to counsel's decision not to personally interview and call a witness, and the proper standard for determining whether counsel's decision prejudiced the defense.

A. The State's Case Against Lord

Tracy Parker disappeared on September 16, 1986. Police discovered her body two weeks later. Respondent Brian Keith Lord was arrested and charged with Tracy's murder.

The Washington Supreme Court described Lord's case as "surely one of the most complex ever tried in this state." *State v. Lord*, 117 Wash. 2d 829, 916, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992) (App. 272a). The trial lasted 37 days, approximately 100 witnesses testified, and experts testified on all or part of 18 days, demonstrating the "unusual complexity of the scientific evidence in this case." *Id.* at 857. There were almost 9,000 pages of transcripts, more than 700 pages of clerks papers, and approximately 200 exhibits.

The prosecution presented extensive scientific evidence tying Lord to the murder, including over 100 pieces of trace evidence. *State v. Lord*, 117 Wash. 2d at 843. Among other things, Lord's red towel was found with Tracy's clothing, stained with Tracy's blood type. *Id.* An orange U-Haul blanket Lord admitted having contact with was stained with a unique

enzyme, present in Tracy's blood, that is found in only 9 percent of the white population. *Id.* Although DNA evidence was not available at the time of trial, post-trial DNA testing by defense experts was not exculpatory. *See In re the Personal Restraint Petition of Lord*, 123 Wash. 2d 296, 320, 868 P.2d 835, *cert. denied*, 513 U.S. 849 (1994). Telephone records placed Tracy and Lord at the same house within minutes of each other the night of the murder. *Lord*, 117 Wn.2d at 838-39. The prosecution presented evidence of Lord's bizarre behavior the night of the murder, as well as his attempts to suborn perjury. *Id.* at 839-41 and 847-48. Finally, the prosecution presented Lord's detailed confessions to the murder. *Id.* at 848.

Lord was convicted and sentenced to death for the aggravated first-degree murder of Tracy Parker. The Washington Supreme Court affirmed the conviction and sentence on direct appeal, and the court denied Lord's post-conviction, collateral challenge. *State v. Lord*, 117 Wash. 2d at 916 (App. 272a); *In re the Personal Restraint Petition of Lord*, 123 Wash. 2d at 332-33. A complete summary of the facts of the murder and the evidence presented at trial may be found at *State v. Lord*, 117 Wash. 2d at 838-49 (App. 141a-162a).

B. Federal Habeas Corpus Proceedings

Lord filed his habeas corpus petition in 1994. Among his 58 claims, Lord alleged ineffective assistance based on counsel's failure to call the three teenagers as witnesses. Prior to the discovery of her body, numerous people reported sightings of Tracy to the police. Among those were three teenage boys who reported that they had glimpsed Tracy walking as they drove down a road. The boys claimed the sighting occurred on September 17, 1986, the day after Tracy disappeared.

Lord's original defense counsel received copies of the reports on the police interviews of the teenagers, and counsel hired an investigator to interview them. The investigator

provided reports of the interviews to counsel. (App. 346a-347a). Lord's original counsel withdrew prior to trial, and the court appointed Ronald Ness and Judith Mandel to represent Lord.[1] Mr. Ness and Ms. Mandel reviewed the work product of Lord's prior counsel, and retained a second defense investigator to re-interview the boys. The second investigator also provided written reports of the interview to counsel. (App. 343a-345a and 348a-349a). After reviewing the various reports and discussing the matter with the second investigator, Mr. Ness and Ms. Mandel decided not to personally interview the teenagers or to call them as witnesses.

The district court conducted an evidentiary hearing on Lord's claim. The evidentiary hearing showed that Mr. Ness and Ms. Mandel hired Mr. Zornes, an experienced defense investigator, to re-interview the teenagers. (App. 337a). After Mr. Zornes reported back, counsel determined "the three individuals were not very positive in either identification or timing." (App. 337a).

Robert Huff "could not recall the exact date of the sighting, nor the day of the week". (App. 343a). Paul Holden and Greg Ayers "when pressed about the exact day they would at times waver." (App. 348a). "Holden said that he and ROBERT HUFF, JR. had gone clam digging on either Monday or Tuesday of the week beginning September 15, 1986, and that Greg Ayers joined them on the second day, which would have been either Tuesday or Wednesday." (App. 348a). Holden admitted "he did

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[1] At the time, Mr. Ness had 14 years experience as a criminal defense attorney, and he had tried one prior capital case. Ms. Mandel had extensive criminal law experience, as both a prosecutor and a defense attorney. The Washington Association of Criminal Defense Lawyers honored Ms. Mandel for her work on Lord's case with the William O. Douglas Award, which is given to an attorney demonstrating high levels of dedication and accomplishment in criminal defense. Counsel were aided by a jury selection expert, medical experts and forensic experts.

not get a good look at Parker," and "he could not testify that he was 100% factually certain that it was Tracy as he had only a five second glance at the girl." (App. 346a and 349a).[2]

There was no independent evidence supporting the boys' claim that Tracy was alive on Wednesday, September 17, 1986. There was no evidence explaining why, if Tracy had not been kidnapped and murdered on Tuesday night, she did not go home after telling her friend that "she had to 'hurry and get home before her mom got home'", and that she was going to "'go straight home.'" *Lord*, 117 Wash. 2d at 838. There was also no independent evidence explaining why, if Tracy had not been kidnapped and murdered on Tuesday night, she did not go to school on Wednesday. *Id.* at 885. The fact that Tracy did not go home as she intended and did not go to school the next day indicated Tracy was no longer acting on her own free will. That evidence discredited the boys' claim they had seen her ***alone*** on Wednesday.

Mr. Ness and Ms. Mandel consciously decided not to call the teenagers as witnesses. (App. 338a). Mr. Ness did not believe the teenagers would have been supportive of the defense pursued at trial. (App. 328a). Mr. Ness testified that "[i]n terms of whether or not they were beneficial, our decision was that they probably were not." (App. 328a). Mr. Ness explained, "we felt it would affect our credibility with the jury because of the nature of what we had discovered in terms of their interviews with our investigator and, I believe, with the police." (App. 338a). "We did not believe that they were accurate. And we were concerned about our credibility with the jury in presenting testimony that

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[2] The fact the teenagers did not see Tracy's family and the scores of volunteers searching for her on Wednesday suggests that, if the sighting occurred at all, it occurred on Tuesday. Even if the sighting did occur on Wednesday, the boys might have seen Tracy's sister, Shannon Parker, who resembled Tracy and who had been searching the area on the date of the alleged sighting.

may not have been beneficial." (App. 330a). "[W]e didn't feel that they were going to be beneficial and may have affected what we thought would be our credibility to the jury." (App. 330a).

Ms. Mandel testified that, after Mr. Zornes had outlined the interviews, they decided not to pursue the evidence because "we had concerns about their credibility and therefore about our credibility." (App. 341a). Ms. Mandel said the teenagers, and the other people who claimed to have seen Tracy, "all fell into the category of testimony that we, we decided we did not want to present." (App. 342a).

Following the evidentiary hearing, the Honorable Barbara J. Rothstein, United States District Judge, ruled the decision not to use the testimony of the teenagers did not constitute ineffective assistance of counsel. The district court concluded:

> Having carefully reviewed all of the documentary evidence submitted on this claim and having heard the testimony of the three witnesses as well as the opinion of Lord's expert witness, ***the court concludes that the decision not to call them was a reasonable strategic choice which did not amount to ineffective assistance of counsel.*** Defense counsel reasonably could have found sufficient discrepancy among the witnesses' various accounts, sufficient uncertainty in their memories and sufficient question about the accuracy of their identification as well as the date on which the event happened to decide not to call them as witnesses. Defense counsel could also reasonably have been concerned that these discrepancies and inconsistencies together with facts concerning the witnesses' drinking and drug usage might reflect poorly on the defense.

(App. 88a-89a) (emphasis added).

The district court denied Lord's guilt phase claims, but vacated the death sentence on a different ground. (App. 33a-121a). Both the State and Lord appealed.

The Ninth Circuit issued its opinion on July 14, 1999, reversing the order denying Lord's ineffective assistance claim. The court found counsel ineffective in the guilt phase by not calling the teenagers as witnesses. Recognizing that an attorney is not required to interview every witness, the Ninth Circuit nevertheless held that an attorney's decision not to call a witness made upon a review of an investigator's reports "will be entitled to less deference than if he interviews the witness." *Lord*, 184 F.3d at 1095 n. 8. The Ninth Circuit further held that an attorney cannot make a professional judgment about whether to call a witness "without looking him in the eye and hearing him tell his story." *Id.* at 1095. The court did not reach Lord's remaining claims, and the court dismissed the State's appeal as moot. The court of appeals denied the State's timely petition for rehearing en banc on September 23, 1999. (App. 31a-32a).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit misapplied the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984), for evaluating a claim of ineffective assistance of counsel. The Court should grant this petition because the Ninth Circuit's decision conflicts with the decisions of other courts of appeals applying the *Strickland* standard.

A. Components of a Claim of Ineffective Assistance of Counsel.

The Sixth Amendment recognizes the right to effective assistance of counsel. A claim of ineffective assistance of counsel has two components. First, the defendant must show that "counsel made errors so serious that counsel was not functioning

as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

"Judicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* Thus, a federal court "***must indulge a presumption that counsel's conduct falls within the wide range of reasonable professional assistance*** . . . ." *Id.* (emphasis added). The defendant bears the difficult burden of overcoming the presumption that counsel's action or omission was "sound trial strategy". *Id.* This burden is highly demanding, as the defendant must prove he was denied a fair trial by the gross incompetence of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

To function as "counsel" guaranteed by the Sixth Amendment, a defense attorney must "require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). "When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred." *Id.*

To make the adversarial testing process work, counsel owes a duty to investigate. *Strickland*, 466 U.S. at 690. However, there are countless ways an attorney may fulfill the duty to investigate. *Id.* Consequently, the reviewing court must strongly presume that counsel made all significant decisions regarding a investigation in the exercise of reasonable professional judgment. *Id.* As this Court explained:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete

> investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. ***In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.***

Strickland, 466 U.S. at 690-91 (emphasis added); *see also Kimmelman v. Morrison*, 477 U.S. at 384.

The second component of an ineffective assistance claim is that the "defendant must show the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. To meet this standard, the defendant "***must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.***" *Id.* at 694 (emphasis added).

The Ninth Circuit's decision misapplies both of these components. The court refused to grant the required deference to trial counsel's decision not to call the teenagers as witnesses because trial counsel did not personally interview them. The court also did not determine there was a "***reasonable probability***" that the result would have been different as required by *Strickland*. Instead, the Ninth Circuit based its decision on "***the possibility*** that [the teenagers'] testimony would have led to Lord's acquittal. . . ." *Lord*, 184 F.3d at 1095-96 (emphasis added).

In both of these conclusions, the Ninth Circuit's decision is inconsistent with *Strickland* and conflicts with the decisions of other courts of appeals.

B. The Ninth Circuit Standard Of "Less Deference" Conflicts With The Standard Applied By The Third, Fourth, Seventh, Eighth, Tenth And Eleventh Circuits.

In this case, defense counsel thoroughly investigated the teenagers' story. The teenagers were interviewed by two defense investigators. The Ninth Circuit admitted it would have deferred to counsel's judgment "if they had made the decision not to present the three witnesses after interviewing them in person." *Lord*, 184 F.3d at 1095.[3] However, without any supporting authority, the Ninth Circuit declares "counsel cannot make such judgments about a witness without looking him in the eye and hearing him tell his story." *Id.* The court held the decision not to call a witness, if based upon a review of an investigator's reports, "will be entitled to less deference than if he interviews the witness." *Id.* at 1095 n. 8.

This holding is inconsistent with *Strickland* and directly conflicts with the other circuit courts' application of *Strickland's* mandate that, in reviewing any decision not to investigate, the court must apply "a heavy measure of deference to counsel's judgment." *Strickland*, 466 U.S. at 691. In *Strickland*, this Court was highly deferential to trial counsel's decision not to use the testimony of character witnesses. *Id.* at 699. Yet in *Strickland*, trial counsel did not personally interview potential character witnesses. Indeed, the trial counsel in *Strickland* did not even

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[3] The Seventh, Eighth and Eleventh Circuits agree the decision not to call a witness is the epitome of a strategic decision that the courts will seldom second guess. *See Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir.) (*en banc*), *cert. denied*, 516 U.S. 856 (1995); *Walls v. Bowersox*, 151 F.3d 827, 834 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 1468 (1999). "It would be a rare case where counsel's conscious decision not to call a witness would amount to constitutionally ineffective assistance." *United States v. Weaver*, 882 F.2d 1128, 1139 (7th Cir.), *cert. denied*, 493 U.S. 968 (1989).

have an investigator interview and evaluate potential character witnesses. Nevertheless, this Court concluded that "even without application of the presumption of adequate performance . . . trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment." *Id.*

The Eleventh Circuit has "rejected the position that strategic decisions can be considered reasonable only if they are preceded by a 'thorough investigation.'" *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999). The Eleventh Circuit refused to adopt a per se rule that required an attorney to personally interview potential defense witnesses. *Id.* (rejecting position that counsel must interview all of the defendant's family members). The Eleventh Circuit found such a rule would conflict with *Strickland's* declaration that "'[t]here are countless ways to provide effective assistance of counsel in any given case. . . .'" *Id.* at 1237 (quoting *Strickland*, 466 U.S. at 689-90). "By its nature, 'strategy' can include a decision not to investigate." *Williams*, 185 F.3d at 1237 (citing *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir.), *cert. denied*, 513 U.S. 1036 (1994)). Consequently, "[a] decision to limit investigation is accorded a strong presumption of reasonableness." *Williams*, 185 F.3d at 1237 (quoting *Mills v. Singletary*, 63 F.3d 999, 1021 (11th Cir. 1995), *cert. denied*, 517 U.S. 1214 (1996)).[4]

The Third Circuit applies a similar standard. In assessing counsel's decision not to personally interview and call a potential defense witness, the federal courts "'must apply[ ] a heavy measure of deference to counsel's judgments.'" *Lewis v. Mazurkiewicz*, 915 F.2d 106, 113 (3rd Cir. 1990) (quoting *Strickland*, 466 U.S. at 691). In *Mazurkiewicz*, counsel decided

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[4] The Sixth Circuit has gone as far as to hold that "a defendant is not denied effective assistance of counsel even if his attorney conducts no independent investigation of his own but merely receives and relies upon a prior attorney's work product in going to trial." *Ray v. Rose*, 535 F.2d 966, 975 (6th Cir.), *cert. denied*, 429 U.S. 1026 (1976).

not to call a potential self-defense witness based upon the judgment that the defense would not succeed. *Id.* at 111. Counsel reached this judgment, knowing the substance of the witness' expected testimony, but without personally interviewing the witness. *Id.* The Third Circuit found counsel's decision reasonable. "As *Strickland* made clear, trial counsel was not bound by an inflexible constitutional command to interview every possible witness." *Id.* at 113. Counsel must simply exercise reasonable professional judgment in deciding whether to interview the potential witness. *Id.* Contrary to the Ninth Circuit, the Third Circuit held that in reviewing this judgment, the court must apply a heavy measure of deference. *Id.*

The Eighth Circuit also grants deference to trial counsel's judgment even when trial counsel does not personally interview witnesses. "Only rarely" has counsel's failure to interview potential witnesses sufficed to warrant a finding of ineffective assistance. *Plant v. Wyrick*, 636 F.2d 188, 189 (8th Cir. 1980). An attorney's professional judgment may lead him or her to decline to interview some witnesses and to rely on other sources. *Id.* at 189-90. "Such an exercise of professional judgment will be given the same deference as any other." *Id.* at 190 (quoting *Thomas v. Wyrick*, 535 F.2d 407, 413 n. 7 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976)).

In *Wing v. Sargent*, 940 F.2d 1189, 1190 (8th Cir. 1991), counsel did not interview potential defense witnesses. "Wing's counsel testified that he knew these witnesses and the substances of their potential trial testimony – that Gates had told them that Pratt, not Wing, was the second burglar." *Id.* at 1191. Even though counsel did not personally interview the witnesses, the Eighth Circuit applied a heavy measure of deference to the decision not to call them at trial. *Id.*

In *Sanders v. Trickey*, 875 F.2d 205 (8th Cir.), *cert. denied*, 493 U.S. 898 (1989), Sanders alleged counsel was ineffective for not interviewing and calling a witness who would

have testified that Sanders did not participate in the crime. Like Lord, Sanders argued the lack of an interview rendered the decision unreasonable. *Id.* at 208-09. Rejecting this claim, the Eighth Circuit first noted there is no per se rule that failure to interview witnesses constitutes ineffective assistance. *Id.* at 209. The court then held that counsel "cannot be said to have been ineffective because she failed to interview a witness she had little reason to believe would be useful or helpful." *Id.* at 210.; *see also Schlup v. Armontrout*, 941 F.2d 631, 639 (8th Cir. 1991) (counsel may reasonably decide not to call alibi witness based on review of witness' prior statements), *cert. denied*, 503 U.S. 909 (1992).

The Seventh Circuit has also applied a heavy measure of deference to the decision not to personally interview a witness. In *Lewis v. Lane*, 832 F.2d 1446, 1462 (7th Cir. 1987), *cert. denied*, 488 U.S. 829 (1988), Lewis alleged counsel failed to personally interview potential alibi witnesses. The Seventh Circuit held Lewis' Illinois attorney acted reasonably by relying on interviews conducted by an Iowa attorney:

> Mr. Kinser and defense counsel for Bernice together contacted an attorney in Des Moines who interviewed the witnesses there. ***That attorney told Mr. Kinser that it was her opinion that the witnesses were not credible and that they would lie on the stand to protect petitioner*** and Bernice. Bernice and her counsel decided not to have these alibi witnesses testify because the jury would quickly perceive that they were lying and that that would do far more damage to Bernice's case than the absence of contrary evidence. ***Mr. Kinser was equally justified in reaching that same strategic judgment on behalf of petitioner.*** . . .

Lewis, 832 F.2d at 1462 (emphasis added).

The Fourth and Tenth Circuits also grant the same deference, even if trial counsel does not interview witnesses. The Sixth Amendment "does not always compel counsel to undertake interviews and meetings with potential witnesses where counsel is familiar with the substance of their testimony." *Huffington v. Nuth*, 140 F.3d 572, 580 (4th Cir.), *cert. denied*, 119 S. Ct. 444 (1998). If counsel generally knew the substance of a witness' statements, counsel could make a reasonable tactical decision not to personally interview or call the witness. *Huffington*, 140 F.3d at 580-81; *Wing v. Sargent*, 940 F.2d at 1191. "An attorney's decision not to interview witnesses and to rely on other sources of information, if made in the exercise of professional judgment, is not ineffective counsel." *United States v. Glick*, 710 F.2d 639, 644 (10th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *see also United States v. Snyder*, 787 F.2d 1429, 1433 (10th Cir.), *cert. denied*, 479 U.S. 836 (1986).

Thus, unlike the Ninth Circuit, other circuits that have considered this question do not give less deference to trial counsel's decisions on witness selection simply because trial counsel did not personally interview witnesses. This majority view represents an important practical approach to the effective defense of a criminal case.

In most cases, preparing for trial will include consultation between attorney and client, interviews with important witnesses, and investigation of potentially fruitful defenses. *United States v. Weaver*, 882 F.2d at 1138 (citing *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983)). "If defense counsel is unable to personally complete these tasks, then counsel must seek the aid of others, including experts and investigators, to assist in the preparation and investigation." *Weaver*, 882 F.2d at 1138; *see also United States v. Shetterly*, 971 F.2d 67, 74 (7th Cir. 1992).[5]

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[5] The American Bar Association recognizes that requiring counsel, rather than a defense investigator, to conduct personal interviews imposes an

Consequently, unlike the Ninth Circuit, the other circuit courts believe counsel acts reasonably by relying on investigators to interview potential witnesses:

> ***[I]t is neither unprofessional nor unreasonable for a lawyer to use surrogates to investigate and interview potential witnesses rather than doing so personally.*** *See Harris v. Dugger*, 874 F.2d 756, 762 & n. 8 (11th Cir. 1989). ***In fact, we have criticized counsel in other cases for failing to utilize subordinates to conduct pre-trial investigation.*** *See Henderson v. Sargent*, 926 F.2d 706, 714 (8th Cir. 1991).

Walls v. Bowersox, 151 F.3d at 834 n. 4 (emphasis added).

In reviewing counsel's performance, the courts "'must appreciate the practical limitations and tactical decisions that trial counsel face. . . .'" *Huffington*, 140 F.3d at 581 (citations omitted). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Imposing a detailed set of rules for counsel to follow "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.*

The Ninth Circuit departs from this practical rule and essentially requires trial counsel to personally interview witnesses not called to trial. Attorneys often decide during the course of a trial whether to call a particular witness. It is not always possible or wise for counsel to personally interview all

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inordinate drain on defense counsel's resources. ABA Standards for Criminal Justice § 5-1.4.

witnesses prior to trial.[6] Under the Ninth Circuit standard, however, if counsel has not interviewed a witness prior to trial, counsel must either call the witness at trial or conduct an interview during trial. Trial judges will find it peculiar when counsel asks for a recess in order to interview witnesses whom counsel does not intend to call.

The conflict between the Ninth Circuit and the other circuit courts is significant. The reason "[j]udicial scrutiny of counsel's performance must be high deferential" is to avoid second guessing by defendant or the reviewing court. *Strickland*, 466 U.S. at 689. By granting less deference to trial counsel who does not interview each witness not called to testify, the Ninth Circuit's decision provides a license for a reviewing court to second guess trial counsel. That is exactly what happened in this case. The trial of Lord was a hard fought case in which the adversarial process functioned properly. However, since Lord was convicted, the Ninth Circuit concludes that another strategy might have worked better.

C. The Ninth Circuit's Possibility Standard of Prejudice Conflicts With The Fifth And Eighth Circuits' Reasonable Probability Standard Of Prejudice.

The second component of a claim of ineffective assistance of counsel is that the defendant "must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. "The defendant must show that there is a ***reasonable probability*** that, but for counsel's unprofessional

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[6] For example, during the course of Lord's trial, counsel were busy discovering and developing evidence to rebut the State's extensive scientific evidence. Counsel were not oblivious to, and did not fail to investigate, the teenagers' statements. Counsel simply made the conscious decision to have the defense investigator re-interview the teenagers, thus allowing counsel to focus their attention on the scientific aspect of the trial.

errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). The petitioner must prove counsel's performance prejudiced the defense so "as to deprive the defendant of a fair trial, a trial whose result is unreliable." *Strickland*, 466 U.S. at 687; *see also Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). This standard requires more than a possibility that the evidence might have produced a different result. *Strickler v. Greene*, 119 S. Ct. 1936, 1953 (1999). Rather, the "petitioner's burden is to establish a reasonable ***probability*** of a different result." *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)) (emphasis in original).

Instead of a "***reasonable probability***", the Ninth Circuit found "***the possibility*** that [the teenagers'] testimony would have led to Lord's acquittal to be 'sufficient to undermine confidence in the outcome.'" *Lord*, 184 F.3d at 1095-96 (emphasis added) (quoting *Strickland*, 466 U.S. at 694). The court compounded this error by applying a harmless error analysis rather than determining if a constitutional error in fact occurred. *Cf. Calderon v. Coleman*, 525 U.S. 141 (1998) (recognizing distinction between analysis for determining constitutional error and analysis for determining whether error is harmless); *Kyles v. Whitley*, 514 U.S. at 436 (noting the test for prejudice adopted in *Strickland* would recognize reversible constitutional error only when the harm to the defendant was greater than the harm sufficient for reversal under the harmless error standard of *Kotteakos v. United States*, 328 U.S. 750 (1946)).

The court noted that if the teenagers had testified, the State might still have won a conviction. *Lord*, 184 F.3d at 1096. However, the court added, "we find ourselves 'in grave doubt as to the harmlessness of an error that affects substantial rights,' and must conclude that counsel's omission of this evidence prejudiced Lord's defense." *Id.* (quoting *O'Neal v. McAninch*,

513 U.S. 432, 445 (1995)).[7] Because the Ninth Circuit was unsure if the testimony might possibly have affected the jury's verdict, the court assumed it must find prejudice. By combining the possibility of prejudice standard with the harmless error analysis, the Ninth Circuit did not require Lord to affirmatively prove prejudice. The Ninth Circuit applied too lenient a standard, effectively relieving Lord of his burden of proof on the second prong of the *Strickland* standard.

The Ninth Circuit's more lenient standard of prejudice is inconsistent with *Strickland* which requires a defendant show a "reasonable probability". The Ninth Circuit's decision also conflicts with the standard applied by other circuits. The Fifth Circuit requires the petitioner to "show a '***reasonable probability***' that the jury would have otherwise harbored a reasonable doubt concerning guilt." *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997) (emphasis added), *cert. denied*, 118 S. Ct. 1567 (1998). In a case similar to Lord's, the Eighth Circuit held the district court erred by applying a harmless beyond a reasonable doubt standard in determining if counsel's performance prejudiced the defendant. *Lawrence v. Armontrout*, 961 F.2d 113, 115 (8th Cir. 1992). The Eighth Circuit held the petitioner had the burden "to affirmatively prove that there is a ***reasonable probability*** that, had his trial counsel interviewed and called the alibi witnesses, he would have been acquitted." *Id.* (emphasis added).

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[7] The Ninth Circuit's conclusion on this point is particularly ironic. On one hand, the court faulted trial counsel for deciding not to call the teenage witnesses "without looking [them] in the eye and hearing [them] tell [their] story." *Lord*, 184 F.3d at 1095. On the other hand, the Ninth Circuit gave no deference to the conclusion of the district court judge who actually looked these witnesses in the eye and heard them testify at the evidentiary hearing. In doing so, the Ninth Circuit ignored the district court's implicit findings that the teenagers were not credible.

The Ninth Circuit did not find a reasonable ***probability*** that the teenagers' testimony would have led to Lord's acquittal. Rather, the Ninth Circuit merely found "the ***possibility*** that their testimony would have led to Lord's acquittal. . . ." *Lord*, 184 F.3d at 1095-96 (emphasis added). Absent this lenient standard, Lord could not succeed on his ineffective assistance claim. The prosecution's case against Lord was strong. *Lord*, 184 F.3d at 1088. Lord's confessions, bizarre behavior and attempts to influence testimony, coupled with the considerable forensic evidence tying Lord to the crime, were powerful evidence. *See Strickler*, 119 S. Ct. at 1954. In light of this evidence, Lord could not show more than a possibility of prejudice.

This was not a case where counsel failed to conduct any investigations or aggressively defend Lord. Rather, counsel pursued a defense they believed prudent, presented evidence in support of that defense, and aggressively attacked the State's case. Counsel required the prosecution's case to survive the crucible of meaningful adversarial testing. By reversing the conviction based upon a possibility of prejudice, the Ninth Circuit has established a rule which allows the federal courts to reverse a valid state court judgment based upon virtually any act or omission of counsel that might have had a conceivable effect on the outcome. *Strickland*, 466 U.S. at 693. The purpose of the *Strickland* standard is to ensure the proper operation of the adversarial process, not to second guess an unsuccessful defense strategy. The Ninth Circuit's decision is inconsistent with *Strickland*, and is in conflict with decisions of other circuit courts. This Court should grant the petition to resolve this conflict.

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CONCLUSION

For the reasons stated herein the petition should be granted.

RESPECTFULLY SUBMITTED

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